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No. 86-1380

Supreme Court, U.S.
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In the Supreme Court of the United States

JOSEPH F. SPANIOLO, JR.
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OCTOBER TERM, 1986

ARKANSAS PUBLIC SERVICE COMMISSION;
STATE OF ARKANSAS;
ARKANSAS-MISSOURI CONGRESSIONAL DELEGATION;
and MISSOURI PUBLIC SERVICE COMMISSION,

v. *Petitioners,*

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the District of Columbia Circuit

**RESPONSE OF
OCCIDENTAL CHEMICAL CORPORATION,
GEORGIA GULF CORPORATION AND
JEFFERSON PARISH, LOUISIANA TO
PETITION FOR WRIT OF CERTIORARI**

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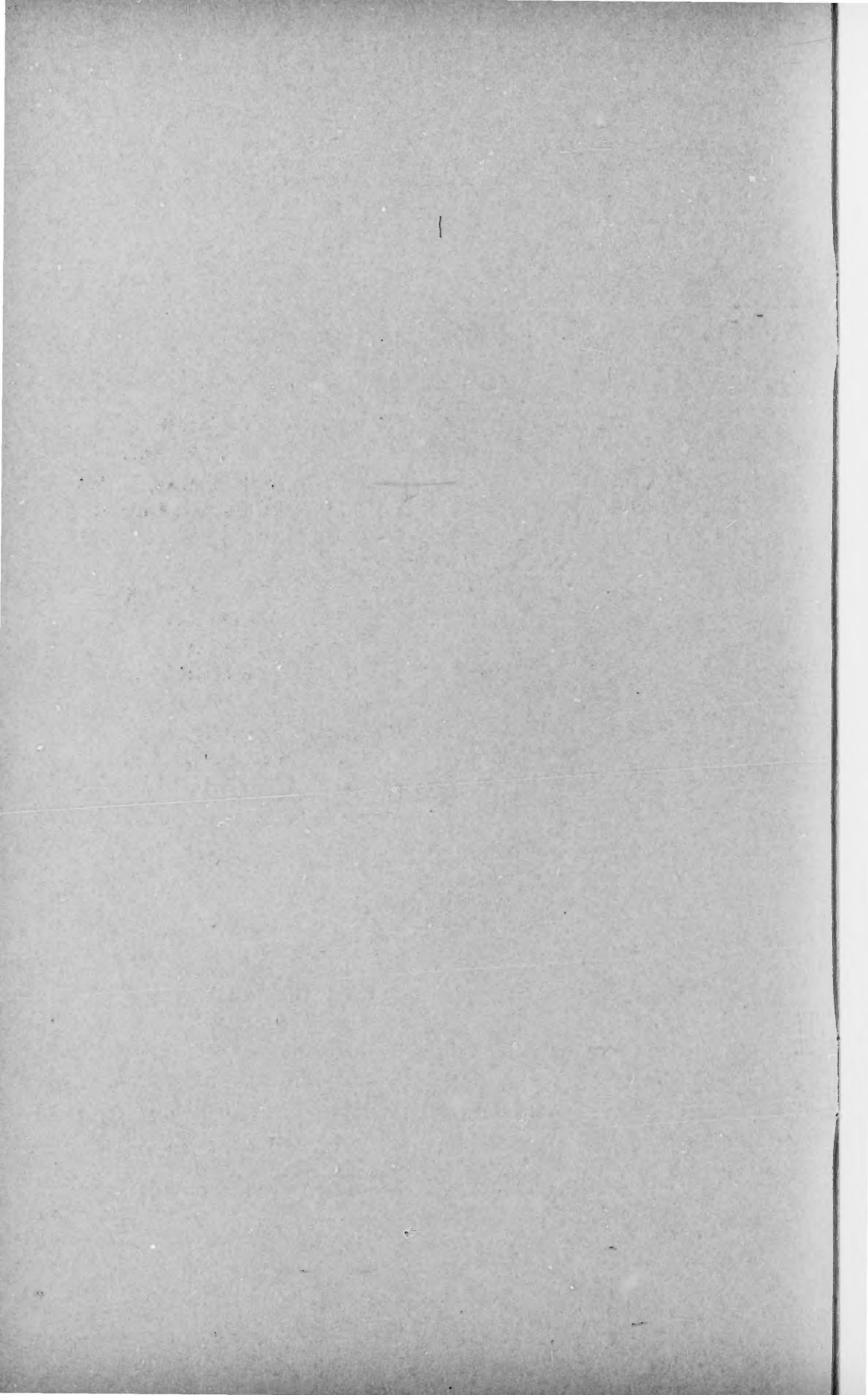
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Occidental Chemical Corporation ("Occidental"), Georgia Gulf Corporation ("Georgia Gulf") and Jefferson Parish, Louisiana ("Jefferson Parish") (collectively "Respondents")¹ hereby submit this preliminary Response to the Petition for Writ of Certiorari ("Petition") filed

¹ Pursuant to Rule 28.1 of the Supreme Court Rules, a list setting forth all parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates of Occidental Chemical Corporation and Georgia Gulf Corporation is attached hereto as an Appendix.

by the Arkansas Public Service Commission, *et al.* (the "Arkansas-Missouri parties") in the above-captioned proceeding. For the reasons that follow, Respondents suggest that the Court (1) defer consideration of the Petition, and (2) hold in abeyance all action in this proceeding pending final action by the United States Court of Appeals for the District of Columbia Circuit on three petitions for rehearing and suggestions for rehearing *en banc* of the panel decision in *Mississippi Industries v. Federal Energy Regulatory Commission* (Docket No. 85-1611 and consolidated cases; judgment entered January 6, 1987).

In support of this Response, Respondents state as follows:

1. The Petition seeks review of the decision of a panel of the United States Court of Appeals for the District of Columbia Circuit in *Mississippi Industries v. Federal Energy Regulatory Commission* (Docket No. 85-1611 and consolidated cases; judgment entered January 6, 1987 ("*Mississippi Industries v. FERC*")). That decision, which considered eighteen consolidated petitions for review, affirmed two orders of the Federal Energy Regulatory Commission ("FERC") which, *inter alia*, allocated costs associated with generating capacity on the Middle South Utilities ("MSU") system, including the costs of the Grand Gulf Unit No. 1 nuclear plant, among MSU's four wholly-owned operating companies.

2. Respondents Occidental and Georgia Gulf are the two largest industrial customers of one of the MSU operating companies, Louisiana Power & Light Company. Respondent Jefferson Parish is a local government entity which represents its 445,000 residents and its commercial and industrial concerns, all of whom are customers of Louisiana Power & Light. Respondents were active participants in the proceedings before FERC, and supported the agency's jurisdiction to determine the justness and reasonableness of MSU's proposed allocations. Respondents also participated actively in the proceedings in the

Court of Appeals, both as petitioners and as intervenor-respondents. As intervenor-respondents, Respondents opposed the jurisdictional challenges to FERC's orders that the Arkansas-Missouri parties have renewed in their Petition herein.

3. On February 20, 1987, the same day that the Arkansas-Missouri parties filed the subject Petition,² three petitions for rehearing and suggestions for rehearing *en banc* of *Mississippi Industries v. FERC* were filed with the Court of Appeals by: (i) The City of New Orleans; (ii) Mississippi Power & Light Company; and (iii) Mississippi Industries, the Mississippi Attorney General, and the Mississippi Public Service Commission. The three rehearing petitions challenge the decisions of FERC and the majority opinion of the Court of Appeals panel on a number of grounds relating to the merits of FERC's allocation of capacity costs on the MSU system (rather than FERC's jurisdiction to modify MSU's proposed allocations).

4. The Petition of the Arkansas-Missouri parties is premature. Rule 20.4 of the Rules of this Court states that "[i]f a petition for rehearing is timely filed by any party in the case, the time for filing the petition for writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of rehearing or of the entry of a subsequent judgment entered on the rehearing." The three petitions for rehearing described above were timely filed with the Court of Appeals. Thus, the time for filing petitions for writ of certiorari has been tolled, as to all parties to *Mississippi Industries v. FERC*, until the Court of Appeals acts upon the rehearing petitions.

5. The positions and arguments of the parties in any certiorari petitions and responses thereto that may ultimately be filed will be affected by the action that the

² Occidental and Georgia Gulf received service of the Petition by messenger delivery on February 25, 1987.

Court of Appeals takes on the petitions for rehearing. If the Court of Appeals denies rehearing, the parties who thereafter file petitions for certiorari will seek review of the original January 6, 1987 majority opinion. If rehearing is granted, the opinion of the Court of Appeals on rehearing may be the focal point of the petitions for certiorari. In addition, while Respondents believe that the rehearing petitions filed in the Court of Appeals are without merit, the various, specific jurisdictional issues presented by the Arkansas-Missouri parties in their Petition may need to be addressed in a different context or, indeed, may be moot if the Court of Appeals remands the proceeding to FERC to reconsider the remedy it adopted in its original orders.³ The possibility of such future actions, both by the Court of Appeals and the other parties, with respect to the same FERC and Court of Appeals decisions that are at issue in the Petition of the Arkansas-Missouri parties renders that Petition premature.

6. Finally, considerations of judicial economy and the efficient use of the resources both of this Court and the litigants support adoption of the course of action suggested herein by Respondents. The issues decided by FERC and the court below, and addressed in the petitions for rehearing and the instant Petition, are complex and interrelated. They are properly dealt with as a whole. The joint appendix before the Court of Appeals consisted of approximately 4,330 pages; the majority opinion in *Mississippi Industries v. FERC* is 93 pages in length. It makes no sense to have this case briefed by the parties, and considered by this Court, twice to deter-

³ For example, there are two MSU agreements in issue in these proceedings, an MSU "System Agreement" and a "Grand Gulf Unit Power Sales Agreement" ("UPSA"). The Arkansas-Missouri parties' jurisdictional arguments focus on FERC's actions with respect to the UPSA. However, if the Court of Appeals remands the FERC orders under review for further consideration, FERC may modify the remedy originally adopted by addressing the capacity sharing provisions of the System Agreement, rather than the UPSA.

mine whether this Court should grant review of the judgment of the Court of Appeals: once in response to the Petition herein; and, yet again, if petitions for certiorari are filed after the Court of Appeals has rendered its final determination on the petitions for rehearing.

7. Accordingly, this Court should defer consideration of the instant Petition, and hold in abeyance all further action in this docket, pending final action by the Court of Appeals on the petitions for rehearing of *Mississippi Industries v. FERC*. Should the Court not concur in Respondents' suggested course of action, Respondents respectfully request that the time for filing briefs in opposition to the instant Petition be extended, pursuant to Supreme Court Rules 22.1 and 29.4, until 30 days after the Court's disposition of this Response.

Respectfully submitted,

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March 12, 1987

APPENDIX

LISTING OF PARENT COMPANIES,
SUBSIDIARIES AND AFFILIATES

Pursuant to Rule 28.1 of the Supreme Court Rules, the following list sets forth all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates of Occidental Chemical Corporation and Georgia Gulf Corporation:

Occidental Chemical Corporation

Canadian Occidental Petroleum Ltd.—Canada
(Dominion)
Direccion Oxy, S.A. de C.V.—Mexico
HCCM, Inc.—California
Hooker Chemical Investment Co.—California
International Ore & Fertilizer Belgium, S.A.—
Belgium
International Ore & Fertilizer S.p.A.—Italy
Occidental Chemical Holding Corporation—California
Occidental Minerals (Philippines), Inc.—Philippines
Occidental Petroleum Corporation—California
Occidental Petroleum Investment Co.—California
Occidental Quimica Do Brasil Ltda.—Brazil
Oxy CH Corporation—California
Oxy Chemical Corporation—California
Oxy Metal Industries (France) S.A.—France
Petway Products Distributors, Inc.—New York
Plasticos y Derivados Compania Anonima
("Playdea")—Venezuela
Plastiflex, C.A. ("Plastiflex")—Venezuela
Sinteticos S.A. ("Sinteticos")—Colombia
Sumitomo Durez Co., Ltd.—Japan
Tri-States Phosphates, Inc.—California
Trans-Jeff Chemical Corporation—Delaware
Vinimarket-Comercio e Industria de Plasticos
Limitada ("Vinimarket")—Brazil
Vinor Vinilicos do Nordeste Ltda. ("Vinor")—Brazil
Vulcan Material Plastico S.A. ("Vulcan")—Brazil

Georgia Gulf Corporation

None.